

No. 82-1167

Office - Supreme Court, U.S.

FILED

JUN 21 1983

ALEXANDER L. STEVAS.
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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

BRADLEY THOMAS JACOBSEN AND
DONNA MARIE JACOBSEN

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE

Solicitor General

D. LOWELL JENSEN

Assistant Attorney General

ANDREW L. FREY

Deputy Solicitor General

DAVID A. STRAUSS

Assistant to the Solicitor General

JOEL M. GERSHOWITZ

Attorney

Department of Justice

Washington, D.C. 20530

(202) 633-2217

QUESTION PRESENTED

Whether law enforcement officers must obtain a search warrant before conducting a chemical field test to determine whether a substance that has lawfully come into their possession and that appears to be cocaine is in fact cocaine.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 683 F.2d 296.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a) was entered on July 27, 1982. A petition for rehearing was denied on October 14, 1982 (Pet. App. 10a). On December 2, 1982, Justice Blackmun extended the time in which to file a petition for a writ

of certiorari to and including January 12, 1983. The petition was filed on that date and granted on March 7, 1983 (J.A. 76). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, respondents were each convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiring to commit that offense, in violation of 21 U.S.C. 846. Respondent Bradley Jacobsen was also convicted of assaulting a federal officer, in violation of 18 U.S.C. 111 (Pet. App. 3a).¹ The court of appeals reversed all the narcotics convictions on the ground that they were based on evidence obtained in violation of the Fourth Amendment (*id.* at 8a).²

1. On May 1, 1981, an employee of Federal Express, a private freight carrier, discovered that a cardboard box given to Federal Express for shipment had inadvertently been damaged in transit (Pet. App. 1a). Pursuant to a written company policy adopted "because of the possibility of insurance

¹ Respondent Bradley Jacobsen was sentenced to a term of one year's imprisonment and three years' special parole on the substantive narcotics count, a consecutive term of six months' imprisonment on the assault count, and a concurrent term of one year's imprisonment on the conspiracy count. Respondent Donna Jacobsen was sentenced to a one-year term of imprisonment and a three-year special parole term on the substantive count, and a concurrent one-year prison term on the conspiracy count, but her sentences were suspended and she was placed on three years' probation on the condition that she serve three months in a jail-type facility. Pet. App. 3a n.1.

² The court of appeals affirmed Bradley Jacobsen's assault conviction (Pet. App. 8a).

claims" (*id.* at 17a), a Federal Express supervisor ordered that the package be completely opened. Inside the package was a ten-inch-long tube wrapped with gray tape; inside the tube were four transparent plastic bags, one inside the other. Federal Express employees cut open the tube, removed the bags, and saw that the innermost bag contained a white powder. *Id.* at 1a, 17a; J.A. 25, 41.

The Federal Express employees believed that the white powder might be an illicit substance, and they notified the Drug Enforcement Administration. They also replaced the bags in the tube and placed the tube in the open box. DEA agents went to the Federal Express office, removed the bags from the tube, and conducted a chemical field test on a small sample of powder from the plastic bags. The test indicated that the powder was cocaine. Pet. App. 1a-2a, 18a; J.A. 60. The package was later found to contain approximately six and one-half ounces of cocaine, with a street value of over \$72,000 (J.A. 69; Tr. 120, 441).^{*}

The DEA agents then rewrapped the package after extracting another sample for further laboratory testing. The package had been addressed to "Mr. D. Jacobs" at an address that the agents ascertained to be respondents' residence. DEA computer files mentioned respondent Bradley Jacobsen in connection with two previous reports of cocaine distribution. On the basis of that information and what they had learned at the Federal Express office, the agents sought and obtained a warrant to search the house to which the package was addressed. Pet. App. 2a, 18a-19a.

^{*} "Tr." refers to the trial transcript.

That afternoon, DEA Agent Lewis, in ordinary clothes, went to respondents' house and delivered the rewrapped package. Respondent Donna Jacobsen signed for the package and accepted it. Approximately one hour later, Agent Lewis returned to the house with the search warrant and several other officers. Respondent Bradley Jacobsen opened the door, and Agent Lewis identified himself as a law enforcement officer. Bradley Jacobsen then slammed the door into Agent Lewis's face, breaking his glasses and knocking him down, and yelled: "Its the police—flush it." Pet. App. 2a, 19a; Tr. 43.

The officers forced the door open and entered the house. They found traces of cocaine, cocaine paraphernalia, and burned remnants of the package. Pet. App. 2a.

2. Before trial, respondents unsuccessfully moved to suppress the evidence found in their house. The district court noted that respondents "concede that the initial search of the package and discovery of the cocaine by the Federal Express employees was not proscribed by the fourth amendment because it was done by private persons" (Pet. App. 13a). The district court also ruled that "when a private person makes an initial search of a closed container and then turns the container over to government authorities, the reopening of the container does not constitute a separate search requiring a warrant" (*id.* 14a-15a).

The court found that before the DEA agents arrived at the Federal Express office, "the Federal Express employees had already opened the box and removed the bags containing the white powder from the gray tube" (Pet. App. 15a). Consequently, "[t]he only investigation of the contents of the box

beyond the investigation by Federal Express employees was the field test by the DEA agents" (*ibid.*). The district court then rejected as "without foundation" respondents' contention that "when federal agents lawfully receive possession of a substance they believe to be contraband, they must obtain a search warrant before [performing] a field test to verify the chemical content of the contraband" (*ibid.*).

3. The court of appeals held that the district court erred in not suppressing the evidence found in respondents' house. The court of appeals noted that respondents did not contend that the Federal Express employees' inspection of the package violated the Fourth Amendment. The court also stated that the government's examination of the package would not violate the Fourth Amendment so long as it was "confined to what [was] exposed by the private search." Pet. App. 5a. But the court of appeals upheld respondents' contention that "the federal agents' search exceeded the scope of the private search" (*id.* at 4a; see *id.* at 5a-6a). The court ruled that "[t]he private search in this case exposed bags of powder, but [respondents'] initial reasonable expectation of privacy that the package's contents would remain private was not entirely frustrated by the private search" (*id.* at 6a).

Specifically, the court of appeals held that the agents violated the Fourth Amendment by conducting the field test of a sample of the powder. The court relied exclusively on *Walter v. United States*, 447 U.S. 649 (1980), in which four Justices of this Court (with a fifth, Justice Marshall, concurring in the judgment) concluded that federal agents violated the Fourth Amendment when they failed to obtain a warrant before viewing, with the aid of a projector, films

that private parties had lawfully acquired and delivered to them but had not themselves viewed on a projector. The court of appeals declared that "[t]he invasion of privacy and collection of inculpatory evidence involved in testing unidentified substances is parallel to the investigation and intrusion involved in screening a film" (Pet. App. 7a n.4). The court explained (*id.* at 6a) :

The DEA agents' extension of the private search precisely parallels that in *Walter*. In both cases, viewing the objects with unaided vision produced only an inference of criminal activity. In both cases, government agents went beyond the scope of the private search by using mechanical or chemical means to discover the hidden nature of the objects. The governmental activity represents a significant extension of the private searches because it revealed the content of the films in *Walter* and, here, the composition of the powder.

The court of appeals accordingly concluded that, because none of the recognized exceptions to the warrant requirement applied, the DEA agents violated the Fourth Amendment when they conducted the field test without a warrant. The court then noted that "[t]he finding of cocaine in a package being sent to [respondents'] home was the core of the affidavit which justified the issuance of the warrant to search the * * * home" (Pet. App. 8a), and it asserted that "[w]ithout the statement that a test indicated the presence of cocaine in the powder, the affidavit does not provide probable cause to believe [respondents] possessed cocaine in their home" (*ibid.*). The court ordered that the fruits of the search of respondents' home—drug paraphernalia, traces of cocaine, and

burned remnants of the package—be suppressed. *Ibid.*

Senior District Judge Becker, sitting by designation, concurred specially “with serious reservations” (Pet. App. 9a). He indicated that he believed the decision in *Walter* required the result reached by the court of appeals but that he agreed generally with the views expressed by Justice Blackmun’s dissent in *Walter*. The government’s petition for rehearing was denied, with three judges voting to rehear the case en banc (*id.* at 10a).

SUMMARY OF ARGUMENT

A. The court of appeals plainly erred in concluding that the agents had to obtain a warrant before conducting the field test. A chemical analysis of a substance that is already in the possession of the authorities will seldom, if ever, reveal any additional information that a reasonable, innocent person would want to keep private. Individuals simply do not use the molecular structure of a chemical substance as a repository for their secrets.

In any event, any legitimate privacy interest that a person might in some exceptional circumstances have in the chemical composition of a substance he owns is not implicated in this case. The field test conducted by the DEA agents here was capable of revealing only one thing—whether the substance discovered by the Federal Express employees was cocaine. Had that substance not been cocaine, the test would have revealed nothing about it. The test was therefore incapable of disclosing any information whatever about an innocent substance, an innocent activity, or an innocent person; the only information it revealed was information that respondents could have no legitimate interest in keeping private. For these rea-

sons, the field test could not possibly have invaded any interest protected by the Fourth Amendment. When the government is able to obtain evidence of a crime without infringing any legitimate, socially protected interest, it is simply irrational to restrict its authority to do so.

At the same time, the court of appeals' holding would impose extraordinary burdens on the investigation of drug offenses. Law enforcement officers routinely perform chemical analyses of suspicious substances, and the logic of the court of appeals' warrant requirement cannot be limited to analyses performed on substances obtained through a private search like the one involved here. Consequently, under the court of appeals' approach, law enforcement officers would have to obtain literally thousands of additional warrants each year. Moreover, although the results of field tests and chemical analyses have been used in countless prosecutions in the past, we know of no other court that has ever suggested that the government must have a warrant before it can perform such a test. This consensus is further evidence that the court of appeals' novel holding here was in error.

B. Respondents also incorrectly suggest, as do certain passages in the court of appeals' opinion, that the actions taken by the agents preparatory to the chemical analysis violated the Fourth Amendment. It is clear that the agents lawfully came into possession of the package that had been sent to respondents; that package was initially searched by private parties—the Federal Express employees—who turned it over to the DEA, and it is well established that the Fourth Amendment does not apply to private searches. In removing the transparent bags from the package, the agents did not exceed the scope of the private search. Nor was it a search to open the plastic bags in order

to obtain a sample for testing; a transparent container is the best example of a container the "contents [of which] can be inferred from [its] outward appearance." *Arkansas v. Sanders*, 442 U.S. 753, 764-765 n.13 (1979). Finally, the removal and destruction of the minuscule amount of cocaine needed for testing did not violate the Fourth Amendment; in view of the small amounts involved, and the abundant grounds the agents had to believe that it was contraband, this was surely not an unreasonable seizure, if it was a seizure at all. In any event, probable cause alone, without a warrant, ordinarily suffices to sustain the reasonableness of a seizure.

ARGUMENT

THE AGENTS WERE NOT REQUIRED TO OBTAIN A WARRANT BEFORE CONDUCTING A CHEMICAL TEST OF THE POWDER LAWFULLY IN THEIR POSSESSION TO DETERMINE WHETHER IT WAS COCAINE

The court of appeals' reversal of respondents' convictions appears to rest in large measure, if not entirely, on the conclusion that the chemical field test was a search within the meaning of the Fourth Amendment because it "revealed * * * the composition of the powder" (Pet. App. 6a), and that it accordingly could not be undertaken without a warrant. We first explain, in subpoint A, why this unprecedented and mischievous conclusion is plainly wrong. Then, in subpoint B, we refute the contention apparently made by respondents (see Br. in Opp. 6-8), with some support from passages in the court of appeals' opinion, that actions taken by the agents preparatory to the field test—such as removing the plastic bags from the tube and extracting samples for testing—also violated the Fourth Amendment.

A. Law Enforcement Officers Need Not Obtain a Warrant Before Conducting Any Chemical Analysis, and a Chemical Analysis That Reveals Only Whether a Substance Is Contraband Is Not a Search Within the Meaning of the Fourth Amendment.

1. The Fourth Amendment does not regulate every action that a law enforcement officer takes in investigating crime; it applies only to "searches and seizures." And the government has not conducted a search unless it has intruded on some person's "legitimate expectation of privacy." See, *e.g.*, *United States v. Knotts*, No. 81-1802 (Mar. 2, 1983), slip op. 4-5; *Smith v. Maryland*, 442 U.S. 735, 740-741 (1979); *Terry v. Ohio*, 392 U.S. 1, 9 (1968). It is not enough, of course, that a person expects, or hopes, that his activities will go unnoticed by the authorities; that "expectation [must] be one that society is prepared to recognize as 'reasonable' " or legitimate. *Katz v. United States*, 398 U.S. 347, 361 (1967) (Harlan, J., concurring); see, *e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978).

The concept of a "legitimate" expectation of privacy is not self-defining. To a considerable extent, of course, the Court looks to whether the information in question was acquired by seeing or hearing that which is exposed to public perception. A government agent can learn a great deal of information about an individual by, for example, tracking his movements on the public roads for an extended period of time or recording the telephone numbers he dials, but the Court has concluded that neither of these investigative measures constitutes a search regulated by the Fourth Amendment. *United States v. Knotts*, *supra*; *Smith v. Maryland*, *supra*. Even where there is some intrusion into areas that are not public, such as privately owned but open fields, the Court considers the extent to which a typical member of our society would

reasonably expect to maintain a meaningful degree of privacy from uninvited intruders; where there would in practice be little or no such expectation, an official intrusion into the area is not considered a search. *Hester v. United States*, 265 U.S. 57 (1924). The Court similarly draws upon common understandings about society's weighting of personal privacy interests in assessing the "standing" of a particular defendant to complain about a search that does invade the privacy interests of someone, but not necessarily of the individual before the bar. See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98, 104-105 (1980); *Rakas v. Illinois*, *supra*, 439 U.S. at 140-149. The fundamental theme informing these related inquiries is that the protections afforded by the Fourth Amendment apply only where there is a significant danger that government action will intrude into an area which a significant segment of our society regards as enjoying meaningful privacy attributes—that is, where there is a material danger that the government action will reveal matter both that people generally wish to guard from public knowledge and that they have taken reasonable precautions to conceal from public access.

2. a. Once the authorities have lawfully come into possession of a substance, a chemical analysis of it will seldom reveal any additional information that its owner might legitimately wish to keep private. For that reason, a chemical analysis will rarely, if ever, interfere with any interest protected by the Fourth Amendment.

Individuals simply do not "lock" their secrets into the molecular structure of a substance in the way they might, for example, place private objects in certain containers, private thoughts on a tape recording, or private activities on film. An analysis might enable the government to learn that a white powdered substance that appeared to be an illicit drug was

actually talcum powder or sugar; but in learning that a suspicious substance already visible to government agents is actually some innocent material, the government has not invaded any person's privacy in any meaningful way. Indeed, people routinely label innocent substances, so that their composition will be immediately apparent to anyone who is entitled to view them. When an innocent substance is not labelled, that is generally because a label is unnecessary, not because the composition of the substance is a secret. It is almost always a matter of indifference to the owner of an innocent substance whether another person who is legitimately in possession of it and is entitled to examine it visually knows its chemical composition as well.⁴

We recognize that it is possible to imagine a case in which a person might legitimately wish to keep private the chemical composition of a substance in his possession—for example, if it is a lawful drug that is used to treat mental illness. Cf. *Whalen v. Roe*, 429 U.S. 589, 599-602 (1977). Even in such a case, however, a chemical analysis can disclose only a limited, discrete piece of information about a person. It is not remotely as intrusive as a search of a person's papers or effects.

More important for purposes of this case, in most investigations of illegal drug activity, it will be entirely clear to the authorities, before they conduct any chemical analysis, that they are not dealing with

⁴ To the extent that the court of appeals' rationale depends upon the supposed impropriety of investigation "by using mechanical or chemical means to discover the hidden nature of the objects" (Pet. App. 6a), it would not require law enforcement agents to obtain a warrant before they "analyzed" a substance by tasting it or inhaling it in the way that a user of cocaine would inhale it. But such a "test" is only a somewhat less reliable (and obviously less desirable) means of identifying the chemical content of a substance.

such a medically sensitive substance. Lawful but medically sensitive drugs are stored, shipped, packaged, and used in an entirely different way from illicit substances. No user of a medically sensitive drug, for example, would package or ship it in the way in which the cocaine involved here was sent to respondents. In a case in which there is a realistic possibility that the authorities are in possession of a drug or other substance the composition of which a person might legitimately wish to keep private, it might be appropriate to require them to have some degree of particularized suspicion before they conduct a chemical analysis.⁶ But this is not such a case.⁶

⁶ Even in such a case, we see no sufficient justification for requiring probable cause, and certainly no basis for a warrant requirement. First, as we noted, because a chemical analysis can disclose, at most, only a narrow piece of information, it is not nearly as intrusive as a search of a person's papers or effects. Second, any lawful drug or chemical of a sensitive nature will, in all probability, already be subject to extensive government regulation; the fact that a particular individual possesses it will, therefore, already be known to others and may be accessible to the government in appropriate circumstances. Cf. *United States v. Miller*, 425 U.S. 435 (1976). Third, before law enforcement officers can conduct a chemical analysis of a substance, they must have lawfully obtained possession of it. Any expectation of privacy will, therefore, already have been compromised to a substantial degree before the analysis is conducted. Finally, it is unlikely that a warrant requirement will provide any significant additional protection in these circumstances. In general, a law enforcement officer must seek a warrant when he is confronted with the question whether a variety of complex facts amount to probable cause to believe that criminal activity is afoot. It will generally be far easier for an officer to decide whether a particular substance, already in his possession, is probably contraband.

⁶ Moreover, the DEA agents had abundant affirmative grounds to believe that they were dealing with an unlawful drug in this case (see pages 25-26 and note 15, *infra*).

b. In any event, any privacy interests that might be affected by a chemical analysis that reveals the precise composition of a substance are not implicated in this case, because the field test the agents performed was capable of determining only whether the substance lawfully in their possession was in fact cocaine. Had the substance not been cocaine, the test would have revealed nothing else about it.⁷ The test therefore could not have revealed any information at all about an innocent substance, an innocent activity, or an innocent person. Because the field test could not have interfered with any interest that is even arguably protected by the Fourth Amendment, it cannot be regarded as a search within the meaning of the Amendment.

The purpose of the Fourth Amendment is to protect against unreasonable government intrusion into individuals' innocent private affairs, not to give criminals greater security in their illicit enterprises. The Fourth Amendment regulates certain investigative actions not because they uncover evidence of crime but because most such actions, in the course of uncovering information concerning illegal conduct, will unavoidably also reveal information about lawful activity, or otherwise invade legitimate interests that the Fourth

⁷ At trial, the agent who conducted the field test described it as "a Scott reagent field test . . . for cocaine" (J.A. 72) and briefly explained its operation. The DEA informs us that this test will reveal only whether or not a substance is cocaine; if it is not cocaine, the test will not reveal its composition. This fact was not brought out at the suppression hearing or the trial, because neither focused on the precise nature of the test. But the court of appeals did not suggest that it believed that the test revealed more than whether a substance is cocaine, and the court of appeals' holding does not rest on the premise that the test would reveal any other information.

Amendment protects. Indeed, many investigative techniques—such as the surveillance of a person in a public place, or the monitoring of an individual's conversations with a person whom he does not know to be a government informer—are unquestionably not searches even though they reveal to the authorities much information that an innocent person might well want to keep private.

But the field test at issue here could not have disclosed *any* information about lawful activity. It was capable of revealing information only about illegal conduct. Nor did it in any other way constitute an "intrusion upon cherished personal security" (*Cupp v. Murphy*, 412 U.S. 291, 295 (1973), quoting *Terry v. Ohio*, *supra*, 392 U.S. at 24-25) or otherwise interfere with any interest arguably protected by the Fourth Amendment. There is, accordingly, no basis for concluding that this technique is subject to the Fourth Amendment. When the authorities are able to obtain evidence of a crime without infringing any legitimate private interest, it is simply irrational to restrict their authority to do so by imposing procedural requirements that cannot serve to protect significant individual rights.

Of course, the purpose of the field test was to reveal information about respondents' activities that they undoubtedly were eager to keep private—the fact that the substance discovered by the Federal Express employees was cocaine. But the desire to keep this information from the authorities is perhaps the best example of a privacy interest that society is *not* "prepared to recognize as 'reasonable'" (*Katz v. United States*, *supra*, 389 U.S. at 361 (Harlan, J., concurring)). Society has no reason at all to protect a person's hope or

expectation that his crime will escape detection, and that is the only expectation that could possibly have been jeopardized by the DEA agents' field test.⁸ Cf. *Roberts v. United States*, 445 U.S. 552, 557-558 (1980); *Branzburg v. Hayes*, 408 U.S. 665, 695-697 (1972); pages 24-25, *infra*.

Walter v. United States, 447 U.S. 649 (1980), far from supporting the court of appeals' conclusion, is instructive in showing the court's error. Viewing a film discloses far more information that a person has a legitimate interest in keeping private than conducting a chemical analysis of a powder that is sus-

⁸ We do not deny that there is an important sense in which the Fourth Amendment "protects the guilty as well as the innocent": law enforcement officers who comply with the Fourth Amendment will sometimes lack the quantum of suspicion needed to conduct a search that would, in fact, have revealed evidence of a crime, and as a result a guilty person will escape detection. But this benefit to the guilty is simply an unavoidable byproduct of the protection that the Fourth Amendment affords to the innocent. It does not mean that the Framers of the Amendment intended to give guilty persons a "right" to avoid detection. The rights of innocent persons can be adequately protected only if insufficiently supported searches are proscribed before they are even conducted, at a time when it is impossible to be certain whether the search will uncover evidence of crime; as a result, some guilty parties must, unfortunately but unavoidably, escape detection if the Amendment is to protect the innocent.

This case, however, involves an investigative technique that cannot possibly intrude on the rights of the innocent; it can invade a "privacy" interest only of a person engaged in criminal activity. It is obviously unreasonable to restrict the use of such a technique in the ways that techniques that could invade the privacy interests of innocent persons may appropriately be restricted.

pected of being a controlled substance. Viewing a film reveals much about the ideas and attitudes of the person who made it, and about the interests and tastes of the recipient. See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). This is true even if, as in *Walter*, the contents of the film are described on its container; specific aspects of the film may reveal additional facts. Partly for these reasons, the viewing of a film implicates the First Amendment, which played a role in *Walter*. See 447 U.S. at 655 & n.6 (opinion of Stevens, J.); *Roaden v. Kentucky*, 413 U.S. 496, 502 (1973), quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 472 (1971) ("The seizure of instruments of a crime, * * * or 'contraband * * *' [is] to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards."). A chemical analysis is incapable of disclosing even remotely comparable information or of invading an individual's privacy to a comparable degree, and there is no justification for the court of appeals' ill-considered equation of the viewing of a film with a chemical analysis.

3. The court of appeals' holding that a chemical analysis requires a warrant not only protects no legitimate privacy interest; if the court's approach were to prevail, it would impose extraordinary burdens on the investigation of narcotics offenses. Chemical analyses are, obviously, often indispensable in deciding whether to pursue an investigation further, as well as in proving a case against a person charged with a drug offense. As a result, law enforcement agents have tested suspicious substances—either in the field or in a laboratory—on innumerable occasions.

In this case, the substance came into the agents' possession as the result of the private search by Federal Express employees, but the logic of the court of appeals' holding cannot be confined to such cases. The court of appeals would apparently rule that the government conducts a search whenever it performs a test that "reveal[s] * * * the composition of [a] powder" (Pet. App. 6a) unless, presumably, all those able to claim an interest in the powder have relinquished their claim to keep its composition secret. Thus, under the court of appeals' ruling, law enforcement agents would certainly have to seek a warrant every time they wished to conduct a test on a substance obtained through a warrantless search—such as a probable cause search of a vehicle or a search incident to arrest, which are both common means of uncovering illicit drugs. The authorities might also have to seek a second warrant every time they wished to test a substance seized pursuant to a search warrant that did not specifically authorize a chemical analysis.

As a result, under the court of appeals' approach, law enforcement agents would have to obtain literally thousands of additional warrants each year. This massive burden on law enforcement and judicial resources is itself good reason to hesitate before imposing a warrant requirement. In addition, many investigations that could be aided by a chemical analysis would be impaired, either because the agents lacked probable cause or because they could not afford to expend the time and effort needed to obtain a warrant. And these costs would be incurred even though there is no offsetting benefit to legitimate privacy interests.

Although the results of chemical analyses have been used in countless narcotics prosecutions in the

past, we know of no other court that has ever suggested that the warrant is required before the government may undertake a chemical analysis. On the contrary, every other court of appeals has rejected, either expressly or by implication, the view that a chemical analysis requires a warrant. See, e.g., *United States v. Barry*, 673 F.2d 912 (6th Cir. 1982), cert. denied, No. 81-6942 (Oct. 12, 1982); *United States v. Russell*, 655 F.2d 1261, 1263-1264 (D.C. Cir. 1981), modified on other grounds, 670 F.2d 323, cert. denied, 457 U.S. 1108 (1982); *United States v. Jennings*, 653 F.2d 107, 108 (4th Cir. 1981); *United States v. Walther*, 652 F.2d 788, 790 (9th Cir. 1981); *United States v. Williams*, 622 F.2d 830, 834 & n.8, 839 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981); *United States v. Andrews*, 618 F.2d 646 (10th Cir.), cert. denied, 449 U.S. 824 (1980); *United States v. Bulgier*, 618 F.2d 472, 474 (7th Cir.), cert. denied, 449 U.S. 843 (1980); *United States v. Nieves*, 609 F.2d 642, 644, 647-648 (2d Cir. 1979), cert. denied, 444 U.S. 1085 (1980); *United States v. Edwards*, 602 F.2d 458 (1st Cir. 1979); *United States v. Rodriguez*, 596 F.2d 169, 173-175 (6th Cir. 1979); *United States v. Belle*, 593 F.2d 487, 491, 499-500 (3d Cir.) (en banc), cert. denied, 442 U.S. 911 (1979); *United States v. Crabtree*, 545 F.2d 884 (4th Cir. 1976); *United States v. Ford*, 525 F.2d 1308, 1312 (10th Cir. 1975). See also *People v. Adler*, 50 N.Y.2d 730, 732 n.4, 409 N.E.2d 888, 891 n.4, 431 N.Y.S.2d 412, 416 n.4, cert. denied, 449 U.S. 1014 (1980).

B. The Actions Taken By the Agents Preparatory To the Chemical Analysis Did Not Violate the Fourth Amendment

Although the principal basis of the court of appeals' holding was its conclusion that the chemical analysis was a search requiring a warrant, respond-

ents suggest (Br. in Opp. 6-8) that the agents also violated the Fourth Amendment when they took other actions preparatory to performing the analysis—such as removing the plastic bags from the box, or extracting samples from the plastic bags in order to perform the test.⁹ In fact, none of the actions leading up to the field test even arguably infringed any interest protected by the Fourth Amendment.

1. There is no doubt that the DEA agents lawfully came into possession of the package that had been sent to respondents. The initial search of the package was conducted by private Federal Express employees. The Fourth Amendment does not apply to private searches (*Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)), and respondents have never contended that the government was implicated in the Federal Express employees' inspection of the package. The Federal Express employees, having inspected the package, invited the DEA agents to view its contents; the Fourth Amendment did not prohibit the agents from doing so. See *Coolidge v. New Hampshire*, *supra*, 403 U.S. at 487-490; *Burdeau v. McDowell*, *supra*, 256 U.S. at 475-476.¹⁰

⁹ At one point the court of appeals remarked (Pet. App. 8a): "We find that the agents' removal of the plastic bags, the taking of samples, and the chemical analysis of these samples constituted a violation of [respondents'] fourth amendment rights." But it seems plain that the court of appeals' primary concern was with the chemical analysis itself, which the court equated to the viewing of a film. See *id.* at 6a, 7a n.4.

¹⁰ In addition, the private inspection was required by the standard policies of Federal Express, as was the call to DEA when a suspicious substance was discovered. Pet. App. 17a; J.A. 46. While the courts below did not inquire into the precise terms of the bailment between Federal Express and the person

2. After they were given the partially repacked container by Federal Express, the agents removed the transparent plastic bags containing the white powder from the taped tube. This action, too, was plainly lawful. The court of appeals stated that when the agents first saw the package the bags were visible from the end of the tube. Pet. App. 1a. If this statement is correct, then the Federal Express employees had "exposed [the bags] to plain view" and "it was not incumbent on the [agents] to * * * avert their eyes.'" *Walter v. United States, supra*, 447 U.S. at 661 (opinion of White, J.), quoting *Coolidge v. New Hampshire, supra*, 403 U.S. at 489. That is, the removal of the bags from the tube did not expose anything to the agents' view that the Federal Express employees had not already made visible to them.

Respondents dispute the court of appeals' factual statement; they assert that the Federal Express employees had repacked the package in such a way that, when they turned it over to the DEA agents, the plastic bags were not visible. Br. in Opp. 6.¹¹ But as respondents and the court of appeals apparently acknowledge, nothing should turn on this factual disagreement. It is not disputed that the Federal Express employees inspected the package completely, removing the plastic bags from the tube and examining them, before they repacked it. Thus when the agents removed the bags from the package, they did not exceed the scope of the private search. Both the court

who sent the cocaine to respondents, respondents have never suggested that the Federal Express employees' inspection of the package was tortious or otherwise improper.

¹¹ This factual question was not resolved by the district court, because it correctly viewed the point as "immaterial to the legal issue presented here." Pet. App. 12a-13a.

of appeals and respondents seem to accept the principle that government officials have not conducted a search within the meaning of the Fourth Amendment if they do not exceed the scope of a previous private search, no matter what condition the package is in when it is delivered to the government. See *Pet. App. 5a-6a*; *Br. in Opp. 6* ("This case * * * involves whether Government agents may extend the scope of a search which has already been conducted by private parties.").

This principle also appears to have been endorsed by a majority of this Court (see *Walter v. United States*, *supra*, 447 U.S. at 656, 659 n.14 (opinion of Stevens, J.)); *id.* at 663 (Blackmun, J., dissenting)),¹² and its application in this case is clearly sound. The Federal Express employees, whose actions were at all times lawful, summoned the DEA agents for the specific purpose of showing them the plastic bags containing the white powder. The employees might have chosen to leave the bags in full view while awaiting the DEA agents' arrival; or, when the agents arrived, the Federal Express employees might have removed the bags again to show the agents why they had been called. In either event the removal of the bags would have raised no Fourth Amendment question whatever. Instead, the employees apparently explained to the agents the reason they had been called and invited the agents to remove the bags that the employees had already once removed. These differ-

¹² See also *United States v. Bulgier*, *supra*, 618 F.2d at 474; *United States v. McDaniel*, 574 F.2d 1224, 1226-1227 (5th Cir. 1978), cert. denied, 441 U.S. 952 (1979); *United States v. Pryba*, 502 F.2d 391, 401 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127 (1975); *United States v. Blanton*, 479 F.2d 327, 328 (5th Cir. 1973).

ences in the precise sequence of events cannot be constitutionally significant.¹³

3. After removing the plastic bags from the tube, the agents opened them in order to obtain a sample for testing. It is entirely clear that opening a transparent container does not constitute a search requiring a warrant. The Court has specifically so ruled:

Not all containers and packages * * * will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be

¹³ For these reasons, the question presented by the agents' removal of the plastic bags is different from the hypothetical issue discussed by some of the opinions in *Walter*—"whether the Government's projection of [lawfully seized] * * * films would * * * infringe[] any Fourth Amendment interest if private parties had projected the films before turning them over to the Government" (447 U.S. at 660 (opinion of White, J.)). This is not a case in which the government has simply duplicated a private party's earlier invasion of privacy interests; here, the private party specifically invited the government to view the fruits of its lawful private search. The precise mechanism by which the private party makes those fruits available to the government should not be significant for Fourth Amendment purposes.

Indeed, once Federal Express employees had opened the package and inspected the plastic bags, the DEA agents could have asked Federal Express to bring the plastic bags to DEA headquarters without infringing any privacy interest—even if Federal Express had, in the meantime, repacked the package to some degree. The government could even have subpoenaed the bags when they were in the possession of Federal Express, even if the package had been repacked, without invading any protected privacy interest of respondents. See *Burdeau v. McDowell*, *supra*, 256 U.S. at 476. In these circumstances, the agents' decision simply to go to the Federal Express office and obtain the bags themselves cannot be said to have invaded any protected interest.

inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.

Arkansas v. Sanders, 442 U.S. 753, 764-765 n.13 (1979). A transparent bag is surely the archetype of a container the contents of which can be "inferred from [its] outward appearance"; indeed, those contents were in plain view once the officers lawfully saw the plastic container. Opening the container therefore could not have infringed any interest protected by the Fourth Amendment.

4. Finally, the agents removed a small portion of the cocaine in order to test it, and this cocaine was consumed in the test. These acts were not in any sense a search, because they did not reveal anything that was not already in plain view or otherwise interfere with any privacy interest. See, e.g., *Texas v. Brown*, No. 81-419 (Apr. 19, 1983), slip op. 7-8 (plurality opinion); *United States v. Lisk*, 522 F.2d 228, 230 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976). At most, these actions might be characterized as a seizure of a few particles of the substance. But neither respondents nor the court of appeals appears to have asserted that the removal and destruction of a few particles was an illegal seizure, and it plainly was not.

First, the agent who performed the test described the quantity involved as "a trace amount" that was much less than a gram (J.A. 75); the retention or destruction of such a small amount of a substance is de minimis. See generally *Cardwell v. Lewis*, 417 U.S. 583, 591 (1974) (plurality opinion); *United States v. Van Leeuwen*, 397 U.S. 249 (1970). Second, it is well established that when contraband is involved, the government violates no interest protected

by either the common law (see, e.g., *Warden v. Hayden*, 387 U.S. 294, 303-304 (1967)) or the Constitution when it engages in what would otherwise be a trespass to chattels. See, e.g., *Boyd v. United States*, 116 U.S. 616, 623-624 (1886); *United States v. Washington*, 586 F.2d 1147, 1154 (7th Cir. 1978); *United States v. Pringle*, 576 F.2d 1114, 1119 (5th Cir. 1978); *United States v. Emery*, 541 F.2d 887, 890 (1st Cir. 1976).

Finally, even if the retention or destruction of a small amount of the cocaine was a seizure, the Fourth Amendment permits seizures upon probable cause without a warrant. E.g., *Texas v. Brown*, *supra*, slip op. 8 (plurality opinion) ("[O]ur decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately."); *id.* at 2 (Stevens, J., concurring in the judgment); *Payton v. New York*, 445 U.S. 573, 587 (1980); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977). A seizure that works such a minimal intrusion can surely be justified on the basis of reasonable suspicion not amounting to probable cause. See *Terry v. Ohio*, *supra*; *United States v. Van Leeuwen*, *supra*, 397 U.S. at 252-253; cf. *United States v. Place*, 660 F.2d 44 (2d Cir. 1981), cert. granted, No. 81-1617 (argued Mar. 2, 1983). Here, moreover, it seems beyond serious dispute that there was probable cause. It is unquestioned that the powder had the appearance of cocaine, and it is most unlikely that any lawful white powdered substance would have been shipped in such a way.¹⁴ Thus the

¹⁴ See *Texas v. Brown*, *supra*, slip op. 3 (Powell, J., concurring in the judgment) ("We are not advised of any innocent item that is commonly carried in [an] uninflated, tied-off balloon").

agents had far more than the quantum of suspicion they needed to make any "seizure" that was involved in removing a few grains of the powder for testing.¹⁵

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE

Solicitor General

D. LOWELL JENSEN

Assistant Attorney General

ANDREW L. FREY

Deputy Solicitor General

DAVID A. STRAUSS

Assistant to the Solicitor General

JOEL M. GERSHOWITZ

Attorney

JUNE 1983

¹⁵ The court of appeals' apparent holding (Pet. App. 8a) that there was no probable cause until the field test had been performed is therefore obviously incorrect. This holding appears to have been unconsidered and probably unintended. Indeed, it would lead the court of appeals to the absurd conclusion that the agents were helpless to do anything to interdict the shipment of cocaine or to apprehend respondents, since on the court of appeals' view the agents, lacking probable cause, could never have obtained the warrant the court held they needed to conduct the field test.

Because the court of appeals erred in ruling that the agents lacked probable cause independent of the field test, the evidence obtained in the search of respondents' house (pursuant to the warrant) was not "tainted" by the field test. Thus, even accepting the court of appeals' conclusion that a warrant was needed before the field test could be conducted, that court erred in ordering the suppression of the evidence obtained from the house and the reversal of respondents' narcotics convictions.